FILED
AUG 31
ALEXANDER L. STEVAS
CLERK

No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION,

Petitioner,

vs.

THE UNITED STATES and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

On Petition for Writ of Certiorari to The
United States Court of Customs and Patent Appeals

BRIEF OF RESPONDENT MONTGOMERY WARD & CO., INCORPORATED IN OPPOSITION TO THE PETITION FOR CERTIORARI

NEWTON N. MINOW
Counsel of Record
CHARLES W. DOUGLAS
WALTER C. CARLSON
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Of Counsel:
H. WARREN SIEGEL
JEFFREY S. TORF
THOMAS E. GRACE
MONTGOMERY WARD & CO.,
INCORPORATED
One Montgomery Ward Plaza
Chicago, Illinois 60671

Attorneys for Respondent
Montgomery Ward & Co., Incorporated

August 31, 1982

QUESTIONS RESTATED

1. Should the petition be granted to review the Court of Customs and Patent Appeals' determination that the general compromise authority in 19 U.S.C. § 1617 empowered United States government officials to settle claims relating to duties allegedly owed under the antidumping laws?

2. Should the petition be granted to review the Court of Customs and Patent Appeals' determination, based upon the record before it and the Court of International Trade, that "perfunctory" and "conclusory" allegations and evidence of "bad faith" do not justify judicial review of otherwise unreviewable discretionary government action?

TABLE OF CONTENTS

	PAGE
QUESTIONS RESTATED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. 19 U.S.C. § 1617 Clearly Authorized The United States to Settle Its Claims Under the Antidumping Laws	6
II. The Court of Customs and Patent Appeals Correctly Applied Established Principles of Administrative Law in Holding, Upon Its Review of the Record, That "Perfunctory" and "Conclusory" Allegations and Evidence of "Bad Faith" Do Not Justify Judicial Review of Otherwise Unreviewable Discretionary Government Action	7
III. The Court of Customs and Patent Appeals' Decision Is Not in Conflict with the Decision of the Court of Appeals for the District of Columbia Circuit	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

Bullard v. *Webster*, 623 F.2d 1042 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)	9
CF&I Steel Corp. v. *Economic Development Administration*, 624 F.2d 136 (10th Cir. 1980)	8
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	8
City of Des Plaines v. *Metropolitan Sanitary District of Chicago*, 552 F.2d 736 (7th Cir. 1977)	8

	PAGE
Committee to Preserve American Color Television (a.k.a. COMPACT) v. *United States*, 527 F.Supp. 341 (Ct. Int'l Trade 1981)	3, 7
District of Columbia v. *Schramm*, 631 F.2d 854 (D.C. Cir. 1980)	9
Garcia v. *Neagle*, 660 F.2d 983 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1023 (1982)	9
Greater New York Hospital Association v. *Mathews*, 536 F.2d 494 (2nd Cir. 1976)	9
Hercules, Inc. v. *Environmental Protection Agency*, 598 F.2d 91 (D.C. Cir. 1978)	8
Jaymar-Ruby, Inc. v. *Federal Trade Commission*, 651 F.2d 506 (7th Cir. 1981)	9
Kent Corporation v. *NLRB*, 530 F.2d 612 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976)	8
Local 1219, American Federation of Government Employees v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982)	9
Merrill Ditch-Liners, Inc. v. *Pablo*, 670 F.2d 139 (9th Cir. 1982)	9
National Nutritional Foods Ass'n v. *Mathews*, 557 F.2d 325 (2nd Cir. 1977)	8
Zenith Radio Corp. v. *United States*, 509 F.Supp. 1282 (Ct. Int'l Trade 1981)	8

Statutes And Rules

19 U.S.C. §§ 160-173	2
19 U.S.C. § 1617	*passim.*
19 U.S.C. §§ 1673-1673i, 1677-1677b	2
Trade Agreements Act of 1979	2, 3, 7
Supreme Court Rule 28.1	1

No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION,

Petitioner,

vs.

THE UNITED STATES and MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

On Petition for Writ of Certiorari to The United States Court of Customs and Patent Appeals

BRIEF OF RESPONDENT MONTGOMERY WARD & CO., INCORPORATED IN OPPOSITION TO THE PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner, Zenith Radio Corporation ("Zenith"), seeks review of a decision of the United States Court of Customs and Patent Appeals which held that the Court of International Trade lacked jurisdiction over Zenith's action challenging the United States' settlement of certain claims under the antidumping laws.[1] A brief restatement of the proceed-

[1] Pursuant to Supreme Court Rule 28.1, respondent Montgomery Ward & Co., Incorporated ("Montgomery Ward") states that its

(Footnote continued on following page)

ings below is necessary to correct certain misimpressions conveyed by the petition.[2]

Proceedings in the Court of International Trade

On June 27, 1980, Zenith filed its action seeking to set aside the settlements reached by the United States Department of Commerce ("Commerce Department") and the United States Department of Justice ("Justice Department") in compromise of the United States' claims under the antidumping laws with respect to the importation of certain television sets from Japan.[3] Zenith's complaint pleaded two causes of action. First, Zenith contended that no statutory or other authority allowed the settlement of the United States' claims under the antidumping laws and, therefore, that the settlements were *ultra vires*. On February 27, 1981, the Court of International Trade rejected this contention, finding ample statutory authority for the settlement in 19 U.S.C. § 1617. Appendix at 99a-109a. That decision explicitly considered and rejected Zenith's claim that

---

(Footnote continued from preceding page)

parent company is Mobil Corporation and that Montgomery Ward has no subsidiaries (excluding wholly-owned subsidiaries) or affiliates.

Montgomery Ward was the appellant in the court below, seeking to protect the confidentiality of its sensitive, proprietary business information. Because Zenith's petition seeks relief from this Court which bears upon the possible future discoverability of this information, Montgomery Ward submits this brief in opposition to the petition.

[2] The Court of Customs and Patent Appeals' opinion accurately summarizes the relevant facts. *See* Appendix at 1a-7a.

[3] The antidumping laws, originally the Antidumping Act of 1921, were codified at 19 U.S.C. §§ 160-173. Effective January 1, 1980, the Antidumping Act was replaced when the essential provisions of that law were incorporated in the Tariff Act of 1930, as amended, by the Trade Agreements Act of 1979. Those provisions are presently codified as 19 U.S.C. §§ 1673-1673i, 1677-1677b.

the settlement authority in 19 U.S.C. § 1617 was inconsistent with the legislative amendments to this nation's trade laws embodied in the Trade Agreements Act of 1979. *Id.* at 105a-109a.[4]

Second, Zenith alleged that the United States' claims under the antidumping laws had been settled by the Commerce Department and the Justice Department arbitrarily, in bad faith and unlawfully. After Zenith filed a wide-ranging discovery request premised on this second cause of action, the United States moved for a protective order before the Court of International Trade. On December 12, 1980, that court, without any explanation of the bases for its conclusion, held that Zenith had "made a sufficiently strong showing of bad faith so as to warrant discovery" and ordered the United States to comply with Zenith's request. *See* Appendix at 97a-98a.

Among the documents sought by Zenith's discovery request was an investigative file compiled by the United States Customs Service ("Customs Service") with respect to respondent Montgomery Ward. That investigative file contained Montgomery Ward's sensitive, proprietary business information which had been produced to the Customs Service under strict assurances of confidentiality. Accordingly, Montgomery Ward intervened in the Court of International Trade to protect its interests in the continued confidentiality of its proprietary business documents.

---

[4] The Court of International Trade reached the identical conclusion in *Committee to Preserve American Color Television (a.k.a. COMPACT)* v. *United States*, 527 F.Supp. 341 (Ct. Int'l Trade 1981). That case involves a challenge by the Committee to Preserve American Color Television and the Imports Committee, Tube Division, Electronic Industries Association (hereinafter referred to jointly as "COMPACT"), two of the *amici curiae* to Zenith's petition, to the April 28, 1980 settlements upon essentially the same grounds as were alleged by Zenith.

Upon its intervention in the Court of International Trade, Montgomery Ward, as well as the United States, opposed production of the Montgomery Ward file on the ground, *inter alia*, that Zenith had made no allegations or showing of "bad faith" sufficient to entitle Zenith to *any* discovery. On May 13, 1981, without explanation of its reasons and without opinion, the Court of International Trade overruled the United States' and Montgomery Ward's arguments and granted Zenith's motion to compel. Montgomery Ward's motion for reconsideration was denied, again without opinion or explanation of reasoning, on June 18, 1981.

Proceedings in the Court of Customs and Patent Appeals

To protect its substantial interests, Montgomery Ward appealed from the two orders of the Court of International Trade on the ground, *inter alia*, that those orders were clearly erroneous because Zenith had *never* made a sufficient showing of bad faith to warrant discovery outside the administrative record. The United States intervened in support of this appeal and similarly argued, *inter alia*, that the Court of International Trade had erred in allowing any discovery. Montgomery Ward and the United States designated as the record on appeal essentially the *entirety* of the record before the Court of International Trade so that the Court of Customs and Patent Appeals could independently consider the evidence and allegations which had been before the Court of International Trade both when that court, without explanation, made its finding of "a substantial preliminary showing of bad faith" and when that court ordered the production of Montgomery Ward's documents.

Notwithstanding these thoroughly briefed arguments raised on appeal, Zenith as appellee elected essentially to

ignore them. Instead, Zenith argued, virtually without discussion of its failure to provide any sufficient allegation or evidence of "bad faith," that the appeal should be dismissed because the orders of the Court of International Trade were interlocutory and not appealable.[5]

On March 11, 1982, the Court of Customs and Patent Appeals issued its decision, concurred in by all five judges of that court, concluding that the Court of International Trade was without jurisdiction to review Zenith's challenge to the United States' decision to settle its claims under the antidumping laws. Essentially, the Court of Customs and Patent Appeals reached two conclusions: first, that 19 U.S.C. § 1617 authorized the United States' settlement of its antidumping claims and, second, upon its independent review of the record which had been before the Court of International Trade, that Zenith's "conclusory" and "perfunctory" allegations and evidence of supposed "bad faith" on the part of United States officials did not justify judicial review by the Court of International Trade of otherwise unreviewable discretionary government action.

Subsequent to the March 11, 1982 decision below, Zenith filed a copious petition for rehearing in which it set forth, at length, the bases for its contention that 19 U.S.C. § 1617 did not provide authority for the settlements entered into by the United States. Zenith further argued, as it does here, that the March 11, 1982 decision was made without oral argument and without full consideration of the issues, and Zenith supplied the court below with the same additional, supposed indicia of "bad faith" as it presents in

[5] The Court of Customs and Patent Appeals held that the orders of the Court of International Trade were appealable. *See* Appendix at 8a-9a. Zenith has not sought review of this determination in its petition for a writ of certiorari.

this petition.[6] On May 13, 1982, Zenith's petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

The questions presented in the petition are not appropriate for review by this Court. The Court of Customs and Patent Appeals' holding that the United States had authority to compromise its claims under the antidumping laws pursuant to 19 U.S.C. § 1617 is wholly consistent with well-settled principles of statutory construction and with the lower court decisions considering the same issue. In addition, the Court of Customs and Patent Appeals' conclusion, based on its review of the factual record which had been before the Court of International Trade, that "conclusory" and "perfunctory" allegations and evidence of "bad faith" do not justify judicial review of otherwise unreviewable discretionary agency action, is a straightforward application of well-established principles of administrative law and does not conflict with the decision of any other court of appeals or with any applicable decision of this Court.

I. 19 U.S.C. § 1617 Clearly Authorized The United States To Settle Its Claims Under The Antidumping Laws

Contrary to petitioner's arguments, the Court of Customs and Patent Appeals' determination that 19 U.S.C. § 1617 provided the statutory authority for the United States' compromise and settlement of its claims under the antidumping laws involves no more than a basic question of

[6] COMPACT, *amici curiae* in this Court, raised the same arguments in a lengthy memorandum which it filed in the court below in support of Zenith's petition for rehearing.

statutory construction. In light of the clear language of 19 U.S.C. § 1617 and the absence of any legislative history with respect to the Trade Agreements Act of 1979 which limits the broad settlement authority conferred by 19 U.S.C. § 1617, the Court of Customs and Patent Appeals reached the entirely correct conclusion that 19 U.S.C. § 1617 conferred the requisite authority. This conclusion is wholly consistent with two prior decisions of the Court of International Trade rejecting the precise claims raised here. *See Zenith Radio Corp.* v. *United States*, 509 F.Supp. 1282 (Ct. Int'l Trade 1981) (Appendix at 99a-109a); *Committee to Preserve American Color Television (a.k.a. COMPACT)* v. *United States*, 527 F.Supp. 341, 349-50 (Ct. Int'l Trade 1981). In short, petitioner's statutory authority claim does not present a substantial question which should be reviewed by this Court.

II. The Court Of Customs And Patent Appeals Correctly Applied Established Principles Of Administrative Law In Holding, Upon Its Review Of The Record, That "Perfunctory" And "Conclusory" Allegations And Evidence Of "Bad Faith" Do Not Justify Judicial Review Of Otherwise Unreviewable Discretionary Government Action

The Court of Customs and Patent Appeals' determination that Zenith's allegations did not justify judicial review of otherwise unreviewable discretionary action is a correct application of established principles of administrative law to the facts of Zenith's case. This Court has long recognized that discovery for the purpose of challenging administrative action alleged to have been taken in "bad faith" requires a preliminary "strong showing of bad faith or

improper behavior." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). The courts of appeals, unlike the Court of International Trade in this case, have taken seriously this requirement of a strong preliminary showing of bad faith. *E.g., CF&I Steel Corp.* v. *Economic Development Administration*, 624 F.2d 136, 141 (10th Cir. 1980); *Hercules, Inc.* v. *Environmental Protection Agency*, 598 F.2d 91, 123 (D.C. Cir. 1978); *National Nutritional Foods Ass'n* v. *Mathews*, 557 F.2d 325, 331-32 (2nd Cir. 1977); *City of Des Plaines* v. *Metropolitan Sanitary District of Chicago*, 552 F.2d 736, 739-40 (7th Cir. 1977); *Kent Corporation* v. *NLRB*, 530 F.2d 612, 621 n.21 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). A mere "speculative possibility" that an administrative official acted for some improper reason is insufficient. *Hercules, Inc.* v. *Environmental Protection Agency, supra.*

In the appeal below Montgomery Ward and the United States designated essentially the entire record which had been before the Court of International Trade when that court reached its unexplained conclusion that Zenith had made "a sufficiently strong showing of bad faith so as to warrant discovery" and when that court ordered production of the Montgomery Ward file. On its independent review of that factual record, the Court of Customs and Patent Appeals determined that Zenith's allegations and evidence of impropriety were "no more than perfunctory." Appendix at 19a. The court below analyzed the pleadings, numerous memoranda, documentary exhibits, interrogatory answers, and various other materials filed in the Court of International Trade before reaching its determination that Zenith's claims of "bad faith" were wholly "conclusory." *Id.* at 19a-20a, n.17. No significant purpose would be served by this Court's further review of that factual determination.

III. The Court Of Customs And Patent Appeals' Decision Is Not In Conflict With The Decision Of The Court Of Appeals For The District Of Columbia Circuit

COMPACT's claim, as *amici curiae*, of a conflict between the decision below and the recent decision of the D.C. Circuit in *Local 1219, American Federation of Government Employees* v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982), is without substance. In *Local 1219*, the D.C. Circuit addressed the question of judicial review of agency action under a completely different statute and regulatory regimen. That court's decision, involving the Civil Service Reform Act, is in no way in conflict with the Court of Customs and Patent Appeals' determination involving the exercise of executive discretion under 19 U.S.C. § 1617 in settling antidumping claims. Numerous courts of appeals interpreting statutes similar to 19 U.S.C. § 1617, which do not provide substantive standards for administrative action and which contemplate discretionary action wholly inappropriate for judicial scrutiny, have held such discretionary agency action to be outside the scope of judicial review. *E.g., District of Columbia* v. *Schramm*, 631 F.2d 854, 860-61 (D.C. Cir. 1980); *Greater New York Hospital Association* v. *Mathews*, 536 F.2d 494, 497-98 (2nd Cir. 1976); *Garcia* v. *Neagle*, 660 F.2d 983, 988 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1023 (1982); *Bullard* v. *Webster*, 623 F.2d 1042, 1046-47 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Jaymar-Ruby, Inc.* v. *Federal Trade Commission*, 651 F.2d 506, 510-12 (7th Cir. 1981); *Merrill Ditch-Liners, Inc.* v. *Pablo*, 670 F.2d 139, 140-141 (9th Cir. 1982). The decision of the Court of Customs and Patent Appeals is entirely consistent with the above authority.

CONCLUSION

The Court of Customs and Patent Appeals correctly applied principles well-established by this Court and adhered to by the courts of appeals. The decision below does not conflict with the decision of any other court of appeals, and is based upon an independent factual review of the record before the Court of International Trade. The petition for certiorari should be denied.

Respectfully submitted,

NEWTON N. MINOW
Counsel of Record
CHARLES W. DOUGLAS
WALTER C. CARLSON
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Of Counsel:
H. WARREN SIEGEL
JEFFREY S. TORF
THOMAS E. GRACE
MONTGOMERY WARD & CO., INCORPORATED
One Montgomery Ward Plaza
Chicago, Illinois 60671

Attorneys for Respondent
Montgomery Ward & Co., Incorporated

August 31, 1982